No. 15022

In the United States Court of Appeals For the Ninth Circuit

J. P. TONKOFF, individually, and J. P. TONKOFF, as Trustee of E. J. Welch and Viola Welch, husband and wife, Roland P. Charpentier and Effie Charpentier, husband and wife, and John W. Cramer,
Appellant,

vs.

CLAY BARR AND BETTY BARR, husband and wife,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF OF APPELLANT

TONKOFF, HOLST & HOPP
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THE REPUBLIC PRESS YAKIMA, WASHINGTON

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JURISDICTION

This action was commenced in the United States District Court for the District of Oregon by reason of the diversity of citizenship, U.S.C.A., Title 28, Sec. 1332; plaintiff is a resident of the State of Washington, the beneficiaries E. J. and Viola Welch are residents of the State of Washington, the beneficiaries Roland and Effie Charpentier and John W. Cramer are residents of the State of Idaho, the respondents Clay and Betty Barr, who will be hereinafter referred to as defendants, are residents of the State of Oregon, and Kerr-Gifford Co., a corporation, is incorporated either in the State of

Oregon or some state other than the State of Washington, and the amount sued for is in excess of $3,000.00, exclusive of interest and costs (R. 3, 4).

This case comes within the appellate jurisdiction of this court upon appeal from final judgment in actions at law or in equity, U.S.C.A., Title 28, Sec. 1291. Findings of Fact and Conclusions of Law and Final Judgment were entered in the District Court on the 8th day of December, 1955 (R. 39-46). Notice of appeal therefrom was filed the 28th day of December, 1955 (R. 47) and bond for costs on appeal was filed the 28th day of December, 1955 (R. 47-49).

STATEMENT OF THE CASE

Appellant J. P. Tonkoff, herein designated as plaintiff, brought the above action, individually and as trustee of E. J. and Viola Welch, husband an wife, Roland and Effie Charpentier, husband and wife, and John W. Cramer, as beneficiaries under a trust agreement for the recovery of damages against the defendants Clay and Betty Barr, husband and wife, which damages arose from the failure of the defendants Barr to perform their obligations in accordance with the terms of a certain trust and assignment of the crops which were grown during the year 1953 on what is known as the Meiss Ranch situated in the northern part of California near Macdoel.

THE PLEADINGS

In brief, the plaintiff alleges in his complaint that he was one of the trustees in a certain declaration of trust executed on the 10th day of June, 1953, at Spokane, Washington. That Horton Herman, the other trustee named in the declaration of trust, had resigned as such prior to the bringing of this action (R. 15). That at the time of the execution of the declaration of trust, the defendants Clay and Betty Barr were operating a certain property located in Siskiyou County, California, known as the Meiss Ranch, under a lease dated the 7th day of May, 1953, and which lease named Frank and Dorothy Kofues, husband and wife, and Albert G. and Virginia Kirschmer, husband and wife, Lessors, and the defendants, Clay and Betty Barr as Lessees, and at which time the crops grown upon said property were in good condition (R. 4). At the time of the execution of the declaration of trust the defendants Clay and Betty Barr warranted that there were approximately 2800 acres of crops growing when in truth and in fact said warranty was false and untrue and that there were crops planted and growing in the following amounts:

Oats	1,086 acres
Wheat	132 acres
Barley	1,200 acres
Rye	250 acres
Total	2,668 acres

That defendants Clay and Betty Barr refused, failed and neglected to perform in accordance with the

terms and conditions of their assignment of said crops, which assignment provided that the said defendants would farm the said property in a good and farmerlike fashion, in that:

(a) Said defendants failed, refused and neglected to properly, or at all, spray the growing crops during the growing season in order to destroy noxious weeds which had infested the land and crops, when the exercise of ordinary care and the customs of the locality required said defendants to spray said crops to destroy noxious weeds, so that as a consequence thereof the crops grown on 446 acres could not and were not harvested by the said defendants.

(b) That said defendants failed, refused and neglected to irrigate said crops in a good and farmerlike manner (R. 5) so that as a consequence thereof a large quantity of the crops were either totally destroyed or unable to ripen and develop so they could be harvested.

(c) That said defendants during the first part of August plowed under 120 acres of oats without the consent, knowledge and authority of the trustees or beneficiaries named in the declaration of trust.

(d) Said defendants failed, refused and neglected to harvest the crops in a good and farmerlike fashion in that the harvesting was performed in such a manner in operating the harvesting machines at so fast a speed and in such a manner that approximately 10 per cent of the grain crops were either not harvested or wasted.

(e) That said crops were conveyed from the Meiss

Ranch to Macdoel, California, in trucks which were inadequate or improper for the conveying of said crops so that approximately 5 per cent of the crops escaped over the top, sides and bottom of said trucks.

That had the defendants Clay and Betty Barr cultivated, farmed and harvested said property and crops named in a good and farmerlike fashion, they would have produced and harvested:

Barley: 3,500 pounds per acre; value per hundred weight, $3.00.

Rye: 1,200 pounds per acre; value per hundred weight, $1.90.

Wheat: 1,500 pounds per acre; value per hundred weight, $3.10.

Oats: 4,000 pounds per acre; value per hundred weight, $2.30.

Said crops would have been valued at and would have brought on the market in excess of $250,000.00, at least $125,000.00 of which would have been available to pay plaintiff and his beneficiaries the sum of $72,500.00.

That the defendant Kerr-Gifford Co. is engaged in the business of buying and selling grains and that said crops produced from said property were sold to said company for approximately $70,000.00, one-half of said sum being payable to parties other than plaintiff and beneficiaries, to-wit: owners of the property. That the monetary proceeds from said crops are being retained by the defendant Kerr-Gifford Co., which company refuses to give up any part or portion of said proceeds notwithstanding the fact it was advised and knew

that the plaintiff was and now is the owner of said crops as an individual and as trustee in accordance with the terms, conditions and provisions of the assignment and declaration of trust (R. 7). That further plaintiff asks judgment against defendant Kerr-Gifford Co. for $35,000.00, or 50 per cent of the proceeds from said crops, whichever is the greater sum, with interest at the rate of 6 per cent from November 15, 1953, and for the sum of $72,500.00 from defendants Clay and Betty Barr, with interest at the rate of 6 per cent from November 15, 1953, less such sums as may have been paid to plaintiff individually and in his capacity as trustee by Kerr-Gifford Co. (R. 8).

To this complaint the defendants Clay and Betty Barr interposed a motion to dismiss (R. 16, 17) which motion was denied (R. 18) and by way of answer the said defendants allege that they admit the residences of the parties as stated in the complaint and that plaintiff is one of the named trustees and also a beneficiary under the declaration of trust attached to the complaint; admit that the defendants for a time operated the Meiss Ranch in Siskiyou County, California under lease from Frank and Dorothy Kofues and Albert and Virginia Kirschmer; admit that the crops were sold to Kerr-Gifford Co., which at all times still holds the proceeds from the sale of said crops; but they deny the remainder of complaint (R. 19). As a defense defendants allege that on or about the 9th day of July, 1953, Horton Herman, named as beneficiary under the declaration

of trust, for value received sold, assigned and transferred to Harvey S. Barr all his right, title and interest as a beneficiary thereunder and that on or about the 12th day of October, 1953 the defendants for value received sold, assigned and transferred to A. G. Kirschmer the sum of $15,000.00 which they were to receive from the defendant Kerr-Gifford Co. for the proceeds of said crops under the declaration of trust; that Harvey S. Barr, assignee of Horton Herman, did not consent to the then purported resignation of Horton Herman as trustee under the declaration of trust and refused to accept such resignation in that the complaint failed to join the indispensable parties in that it fails to join Harvey S. Barr, assignee of the beneficial interest of Horton Herman, and that it fails to join Horton Herman who is still co-trustee under the declaration of trust, and fails to join A. G. Kirschmer, assignee of defendant Clay Barr.

For answer to the counter-claim of defendant Kerr-Gifford Co. for interpleader, the defendants Barr allege (R. 20) that the counter-claim fails to state a claim upon which an interpleader can be granted; secondly, deny that Kerr-Gifford Co. is entitled to Attorneys' fees from the proceeds of said grain crops.

That any demand by plaintiff J. P. Tonkoff, individually or as trustee, for the sum of $15,000.00 reserved to the defendants Barr by the assignment of June 10, 1953, thereafter assigned to A. G. Kirschmer, is wholly a sham and frivolous and without right or

color of right and gives no justification to defendant Kerr-Gifford Co. for refusing to pay said sum to A. G. Kirschmer.

That A. G. Kirschmer is a citizen and resident of the State of Texas; that Harvey S. Barr and Horton Herman are citizens and residents of the State of Washington; that the court has no jurisdiction to grant (R. 21) interpleader in this proceeding for the reason that none of the claimants to the proceeds of said crops held by Kerr-Gifford Co. is a citizen or resident of the State of Oregon (R. 22).

In answer and counter-claim to the interpleader defendant Kerr-Gifford Co. in brief alleges: that it is a corporation organized under the laws of the State of Oregon engaged in the business of buying and selling of grains and that it purchased from the defendants Barr a crop produced upon the premises mentioned in plaintiff's complaint and that said defendants are entitled to one-half of the proceeds of said crop (R. 23).

That during the crop year of 1953 defendants Clay and Betty Barr sold to defendant Kerr-Gifford Co. grain produced by them on lands leased from Kirschmers and Kofueses, which lease provided that the lessees were entitled to one-half of the crop; that the grains were purchased for the full purchase price of $88,746.53; that the defendants Clay and Betty Barr, as lessees, or those claiming by, through or under them, were entitled to one-half of the proceeds, name-

ly, $44,373.28, which the Kerr-Gifford Co. presently holds for persons entitled to same (R. 24).

That said defendant believes and therefore alleges that defendants Clay and Betty Barr have assigned to A. G. Kirschmer of Amarillo, Texas, all right, title and interest in and to the sum of $15,000.00 of said proceeds, being the cost of harvesting, as alleged in plaintiff's complaint.

That the sum of $15,000.00 was demanded by plaintiff J. P. Tonkoff and that the defendants cannot safely determine which of said claimants are entitled to proceeds; that the said defendant asked that A. G. Kirschmer be made a party defendant in said action (R. 25).

That the court establish which of said parties are entitled to the sum of $44,373.28, or any portion thereof, and that Kerr-Gifford Co. be discharged from any and all liability upon the depositing by it into the registry of the court the sum in its possession.

An order was entered bringing in A. G. Kirschmer as an additional party defendant (R. 26, 27).

By further pleading the plaintiff alleges that prior to June 1953 E. J. Welch through the plaintiff instituted an action in Superior Court of the State of Washington in Spokane County against Clay Barr and Sterling Higgins charging said defendants with (R. 29) fraudulent conspiracy and praying for damages in excess of $80,000.00.

At the said time Horton Herman was a practicing attorney in Spokane, Washington, and appeared in the

above action on behalf of defendant Clay Barr. That during the course of the trial and before the same was consummated Horton Herman made a proposal of settlement on behalf of defendant Clay Barr. The settlement was consummated and it was agreed that the Welch claim would be settled and compromised at $62,500.00, payable in the following amounts:

> J. P. Tonkoff $15,000.00; E. J. and Viola Welch $27,500.00; Roland and Effie Charpentier $15,000.00; and John W. Cramer $5,000.00;

providing that said sum was to be obtained from the proceeds of a 2,800 acre grain crop in which the defendant Clay Barr had a one-half interest and situate in Siskiyou County, California on property known as the Meiss Ranch.

That during said negotiations Horton Herman insisted an additional sum of $10,000.00 be paid to him as attorneys' fees and that said sum should be obtained from the grain crop. Therefore, the declaration of trust was executed by the parties (R. 12).

Thereafter, on or about the 9th day of July, 1953, Horton Herman conveyed his interest (R. 30) to Harvey S. Barr, father of defendant Clay Barr, for the sum of $7,500.00.

That on or about the 2nd day of July, 1953, plaintiff and E. J. Welch, having been informed that the grain crop was improperly farmed, induced the said Clay Barr to visit said Meiss Ranch in the company of plaintiff and E. J. Welch where it was discovered said crop

was grievously neglected and that the same had not been irrigated nor cultivated, and at which time said Clay Barr promised and agreed to immediately start farming said crop, but refused and failed to comply with said promise and agreement.

Thereafter, on or about the 12th day of October, 1953, defendants Clay and Betty Barr assigned and transferred to A. G. Kirschmer $15,000.00 provided for in the declaration of trust to be paid to Clay Barr.

That during the months of October and November, 1953 the defendants Barr harvested the crops growing on the Meiss Ranch and refused and failed to deposit the crops in accordance with the terms of the declaration of trust, at defendants' expense in warehouses and have warehouse receipts issued in the names of the assignees (R. 31).

That said crop assignments under the declaration of trust were to be sold not later than November 5, 1953, and all sums in excess of $72,500.00, the assignee shall upon receipt of said sum endorse and deliver over to the Barrs all warehouse receipts for crops not sold, but instead the defendants Barr delivered and sold all crops to the Kerr-Gifford Co.

That the said Horton Herman refused to join in a suit with plaintiff against the defendants Barr so that the plaintiff brought an action naming Horton Herman as a party defendant. Thereupon the said Horton Herman filed a motion and advised the court there was no

merit to plaintiff's claim and consequently said action was dismissed.

Thereafter, prior to January 26, 1954, demand by this plaintiff and beneficiary was made upon Horton Herman for his resignation as trustee under the declaration of trust or an alternative action would be instituted to remove him as trustee (R. 32).

Pursuant to said demand, Horton Herman resigned as trustee (R. 29).

That Harvey S. Barr is a total stranger to the declaration of trust and there exists no privity of contract between Clay Barr and Harvey S. Barr and he has no standing in this court under said declaration of trust (R. 33).

By further pleading Clay and Betty Barr allege that of the fund of $44,373.28 deposited in court by Kerr-Gifford Co., the sum of $15,000.00 was expressly reserved to the defendants by assignment of June 10, 1953, to cover their cost of harvesting (R. 34) and that on or about the 12th day of October, 1953, the defendants Barr for value received sold, assigned and transferred to A. G. Kirschmer, who resides in Amarillo, Texas, the sum of $15,000.00, to which the defendants were entitled from the proceeds of the 1953 crops growing on the Meiss Ranch, and that the assignment is in full force and effect.

That the defendants hereby assert on behalf of A. G. Kirschmer a claim in the sum of $15,000.00 out of the proceeds now on deposit with the court (R. 35).

By order of court on September 15, 1955, Kerr-Gifford Co. was discharged from further liability, either to plaintiff or to the defendants Clay and Betty Barr, or the additional defendant, A. G. Kirschmer, because of the payment of the money in the sum of $44,373.28 into the registry of the court on May 20, 1954. That a determination of the amount, if any, to be paid the defendant Kerr-Gifford Co. out of said funds for costs and attorneys' fees be deferred pending further proceedings.

The court retained jurisdiction of the proceedings for the purpose of determining the right of plaintiff, defendants Clay and Betty Barr and A. G. Kirschmer to the said fund (R. 36, 37).

The cause thereupon came on for trial on the issues made between plaintiff and defendants Barr.

THE EVIDENCE

The testimony at the time of trial disclosed that James C. Stevenson, Sr. was and is a grain farmer and stockman residing at Klamath Falls, Oregon. He acquired the Meiss Ranch in 1944 (R. 59). The property is located in Siskiyou County, California, near Macdoel, California (Ex. 21, R. 75) and consists of 13,000 acres, over 3300 acres (R. 81, 101, 361) is irrigable and is tillable peat land, meadows and alfalfa (R. 77). The balance of the acreage is pasture land.

At the time of the acquisition of this property, the now irrigable land was under water and covered with

tules (R. 60, 101, 361). Mr. Stevenson built a dike on the east portion of the property, pumped the water over the dike and drained and cleared the property of the tules. He planted the farm to barley, oats, wheat and rye.

Commencing with 1945, with the exception of about 3 years (R. 61), James C. Stevenson, Jr., son of the owner, managed the property (R. 100). While Stevenson, Jr. was managing the property, it was sold to Frank Kofues and A. G. Kirschmer of Texas, for $1,200,000.00. Each of the purchasers had an undivided one-half interest in the property (R. 101, 437). The sale of the ranch was made subject to leases, which consisted of 200 acres which were situated on the south side of the ranch north of the building site and west of the lake, which in 1953 were planted to potatoes (R. 5, 430). There was also a lease in existence by which Noakes was farming 800 acres (R. 101, 366), which property was located on the extreme southern part of the ranch and east of the lake which was created by the dike (R. 431). Mr. Stevenson, Sr., at the time of the sale of the property to Kofues and Kirschmer, retained the pasture rights of the entire ranch, including the property which was farmed, upon which he pastured 1000 head of stock over the entire property (R. 62).

The property is located at the foot of the mountains in the locality of Mt. Shasta, and collects the drainage from the hills each spring so it is necessary to pump the water over the dike and into the lake in early spring

(R. 103), and until the 1st of July the lake water can be used for irrigation (R. 79, 94). In addition to the lake water, there are three creeks that run through the property, together with 7 wells all of which are equipped with pumps (R. 65, 104, 108).

In the early spring the property is drained by means of canals leading from all portions of the ranch to the dike and from which the water is pumped an elevation of 7 or 8 feet over the dike into the lake (R. 93, 102). During the early summer when the farm land is in need of irrigation, the gates which form a part of the dike are opened and the water is allowed to run back through the canals as indicated on the map and the water is used for irrigation (R. 92).

James C. Stevenson, Jr. continued to manage the ranch after it was purchased by Kofues and Kirschmer from August 7th until May 5th, 1953 (R. 106, 120). Up to May 5th James C. Stevenson, Jr. had planted 1200 acres to grain (R. 106, 123, 188), at which time Clay Barr and wife entered into a lease agreement with Kofues and Kirschmer, leasing the ranch for a period of 10 years, the rental being 50 per cent of the crops to go to the owner and the remaining 50 per cent to the lessee Barr (Ex. 14, R. 181, 182, 192). Barr took over the management of the property and planted in addition to what was planted 250 acres of rye, 132 acres of wheat, and approximately 1085 acres of oats (R. 106), the total planted acreage amounting to 2666 acres.

Stevenson, Jr. was to remain on the ranch as an employee of Kofues, Kirschmer and Barr at a salary of $500.00 per month and expenses plus 5 per cent of the net profits (R. 121, 122, 189, 368, 377) and oversee and keep harmony among the tenants.

Barr's first operation commenced on May 11, 1953, at which time he remained until June 5, 1953, and left to attend a fraud action brought against him by E. J. Welch, one of the beneficiaries in this case (R. 156, 209). After the taking of testimony for two days, he instructed his attorney, Horton Herman (R. 152), to negotiate a settlement, which is the basis for the bringing of this action (R. 155-158). The settlement was entered into on June 10, 1953, at which time Barr through his attorney, Horton Herman, produced the lease agreement which Barr had with Kofues and Kirschmer (R. 255), at which time he offered to assign his portion of the crop to the defendant Welch. After negotiations were had and at the request of his attorney, Horton Herman, the declaration of trust and assignment (R. 8, 15) was executed. The agreement provided that J. P. Tonkoff, then attorney for E. J. Welch, and Horton Herman, then attorney for the Barrs, would act as trustees and from the proceeds of the crop the following payments would be made:

J. P. Tonkoff	$15,000.00
Horton Herman	$10,000.00
E. J. and Viola Welch	$27,500.00
Roland and Effie Charpentier	$15,000.00
John W. Cramer	$ 5,000.00
	$72,500.00

The declaration of trust and assignment also provided:

> "* * *; warrant that there is planted to crops on the above described farm property approximately 2800 acres and that the assignor's interest in said crop is free and clear from any encumbrance. The assignors herein agree to farm said lands in good farmerlike fashion and in accordance with the terms of the aforementioned lease, it being understood and agreed that the assignors are not guaranteeing any particular yield and shall not be liable for crop failure due to any failure beyond the control of the assignors."

The assignment further provides that Barrs would receive from the gross sum of the crops $15,000.00 to pay for the cost of harvesting (R. 10, 11).

Prior to the execution of the trust and assignment agreement on June 10, 1953, E. J. Welch, one of the beneficiaries named in the agreement, telephoned Margaret Stevenson, the wife of J. C. Stevenson, Jr., who was then living on the ranch (R. 128, 129) to inquire as to the condition of the crops, and was advised by Mrs. Stevenson that the crops were in very good condition (R. 132, 527). J. C. Stevenson, Sr. and Jr. corroborate Margaret Stevenson that the condition of the crops was very good on June 10, 1953 (R. 65, 105, 330, 331). Pursuant to receiving this information the declaration of trust and assignment agreements were executed (R. 142). Clay Barr, prior to the execution of the agreements, also represented that the crops were in good condition and that the prospects were that the proceeds from the crops would amount to $250,000.00 or $300,000.00 (R. 143, 471).

On or about the 2nd day of July, E. J. Welch inspected the crops on the ranch and observed that the grain was "burning up" due to lack of irrigation. He immediately came to Yakima, Washington, the residence of J. P. Tonkoff, and so informed him, at which time Tonkoff contacted Horton Herman in Spokane (R. 143) and Herman advised Barr that the ranch needed irrigation (R. 213, 450, 465). Arrangements were made for Barr, Welch and Tonkoff to inspect the ranch immediately, and they did inspect the ranch on Friday, the 3rd day of July, 1953 (R. 126, 144, 214, 215). It was apparent that the crops were in dire need of irrigation and Barr agreed to put a crew on the ranch the following Monday (R. 107, 219), and irrigate. Tonkoff and Welch then left the ranch, leaving Barr there, but on the following day he left and never returned until the 15th of July (R. 107, 259, 260), at which time Stevenson, Jr. and one Perry Morter, one of Barr's employees, had started to irrigate in spite of Barr's absence. Upon arriving at the ranch on July 15th Barr ordered them to cease irrigating (R. 291, 311), even though there was an abundance of water with which to irrigate and one-half mile of irrigation sprinklers which were used for the purpose of irrigating by James C. Stevenson, Sr. (R. 347, 351, 382). Barr, according to his own testimony, remained away from the property from June 20th to August 8th except for two days around the 15th of July, and other witnesses testified they saw very little of Barr around the ranch (R. 115,

131, 508, 533). Barr admitted he was absent from the Meiss Ranch while he was harvesting his own 2300 acre grain farm located in Northern Oregon (R. 210, 249).

Barr was a dry-land farmer and at the time he leased the premises from Kofues and Kirschmer and thereafter during the growing season at Barr's request (R. 66) both Stevensons advised him (R. 119) concerning the planting and particularly that it was necessary to irrigate crops in that area (R. 65, 86, 87). He was advised that there was ample water for irrigation (R. 67, 73) and Barr admits this fact (R. 282), and that Mr. Stevenson had successfully and easily irrigated the ranch (R. 88, 89). Shortly before harvest, Tonkoff, Welch, Charpentier and James C. Stevenson, Jr. inspected the crops and discovered that they were seriously damaged. They took moving pictures (R. 148) of the condition of the ground and the crops, which moving pictures exactly show the condition of the ground and crops starting from the south part of the ranch going to the west (R. 116), then to the north and east. On the southeast side a green area appears (R. 82), constituting approximately 300 acres which were planted to rye, all of which crop had been choked out (R. 67) by weeds, and as a consequence (R. 232) defendant Barr plowed under approximately 200 acres of this grain during the growing season (R. 67, 68, 91, 109, 110, 148, 220, 248, 303, 319).

The evidence is uncontroverted that it is customary

and necessary (R. 67, 151) to spray the weeds when they appear in the grain crop during the latter part of June or the first part of July. Barr was so advised by the Stevensons (R. 201) and agreed to spray the weeds (R. 67), but failed to do so (R. 199), and it was so admitted during the course of trial by opposing counsel (R. 320). Barr had observed the weeds when he had returned from Spokane on June 10th (R. 210), and had discussed this with one Lester Liston, a spray firm doing business in that area, about the 3rd day of July, 1953 (R. 170, 204), at which time the weeds had so overtaken the crops that to spray would have been useless and ineffective (R. 171, 176, 178). In order to procure an effective kill of weeds, spraying must be done when the weeds are small (R. 175), and the spraying for weeds was generally done about June 10th (R. 173). Upon inspection and in the moving pictures the ground appeared extremely dry and contained cracks 1-4 inches in width and in some places 20-30 feet in length (R. 66, 116). The grain was very thin and dried up due to the lack of moisture and was prevented from developing (R. 90, 91, 536) and was 4-8 inches in height in the dry areas (R. 110, 148). Where the crops were exposed to moisture, chiefly along the ditch banks, they stood waist high (R. 108, 148, 171). In the extremely dry areas, there were practically no crops of grain (R. 126, 130, 131, 134, 138, 144) and in other dry areas the crops were dwarfed (R. 263). Kofues, part owner, and Kirschmer, part owner and an experienced grain

farmer (R. 359), visited the ranch the first part of September, and discovered that the crops were very poor, weedy and dry (R. 378, 379, 401, 432). They were dissatisfied with the quality and quantity (R. 385). Both expected a larger crop and believed that the property could produce a $300,000.00 crop (R. 402, 433).

Resident farmers, Richard Ratliff, Clarence Enloe, Mary E. Noakes and James H. Noakes, testified on the part of the plaintiff that in July of 1953 the soil on this ranch was very dry and contained large cracks (R. 317, 494, 500, 512, 517, 528, 535); that the soil on this ranch is rich (R. 524, 531) and productive (R. 498). They further testified that it was customary and necessary to spray for weeds (R. 512) when they appear (R. 401, 492, 513, 530); otherwise, the weeds would overcome and choke out the grain (R. 518), and that the land was not cultivated in a good and farmerlike manner (R. 69, 72, 118, 402) consistent with the standards in the vicinity (R. 494, 534), even though 1953 was one of the best growing seasons that the area had had since 1947 (R. 64, 85, 137), chiefly because there was no frost that year (R. 442, 516), at which time Stevenson, Sr. produced almost an $800,000.00 crop upon the property (R. 347). Had the property been properly cultivated, farmed and harvested, it would have produced a normal crop in the following amounts (R. 111, 112):

Wheat ... 2,500 lbs. per acre	132 acres at $3.15 per 100 lbs.	$ 10,395.00
Oats ..... 2,000 lbs. per acre	1,085 acres at 2.30 per 100 lbs.	49,910.00
Rye ..... 1,200 lbs. per acre	250 acres at 1.90 per 100 lbs.	5,700.00
Barley ... 3,000 lbs. per acre	1,200 acres at 3.10 per 100 lbs.	111,600.00
(R. 63, 72, 137, 151, 493, 517)	(R. 106)	(R. 117, 118)

James C. Stevenson, Sr. testified that he grew barley on the ranch waist high and oats shoulder high (R. 64). He further testified that "a very sloppy job of harvesting" was done, because the harvesters were driven too rapidly, causing the grain to be pushed over and not cut, resulting in much of the grain being left in the fields, so much so that when he turned in his cattle for pasture, two of his cows bloated and perished. When the cows were cut open, they were found to be "plumb full of grain" (R. 69, 113). He estimated that 400-500 pounds of grain per acre were left unharvested and scattered in the fields, which would amount to 1,066,800 pounds. Calculating the waste upon the price of oats, it would amount to $20,269.20 (R. 70, 114, 149, 153, 230). In this area the ducks and geese come in from the north around the middle of September. The crops were ready for harvesting the first part of September, but Barr failed to harvest until the middle of September (R. 94), and as a consequence the wild fowl destroyed about 70 acres of grain (R. 113, 150).

Part of the grain was hauled to Macdoel and some was taken to a warehouse at Merrill. The ranch is situated about 5 miles from the macadamized highway. The grain was hauled in trucks without tarps, in such a manner that it was scattered along the dirt road to the main highway and in some places 1-2 inches in depth (R. 115, 150, 236, 293, 298, 313, 332). The defendant Barr admits that he returned to the Meiss Ranch shortly after June 10th, 1953 (R. 209), stayed

ntil June 20th, at which time he went back to his orthern Oregon ranch and harvested his crops and eturned to the Meiss Ranch for two days with Tonkoff nd Welch on the 1st of July, and then immediately de- arted and went back to his Oregon ranch and returned o the Meiss Ranch on about July 15th, 1953, stayed a ay and returned to his ranch in northern Oregon until ugust 8th (R. 210, 272). He then returned to the leiss Ranch and stayed until September 8th, during hich interim he went to Denver, Spokane, Sacramen- o, and to his northern Oregon ranch (R. 273). Ob- iously, he failed to devote any of his time to the grow- ng and harvesting of the crops, but operated the ranch hrough Perry Morter, a 19-year old cousin, by tele- hone conversations (R. 321) from his northern Ore- on ranch. Prior to 1953 Barr had purchased from irschmer a certain grain elevator in Colorado, upon hich purchase Barr owed Kirschmer $100,000.00, ayable in $15,000.00 installments the first part of anuary. In October of 1953 when he was aware that itigation would arise as a consequence of his farming he Meiss Ranch, he voluntarily made an assignment of he $15,000.00 which he was to receive as harvesting osts to Mr. Kirschmer (R. 245). When the payment as due in the following January, Barr paid the $15,- 00.00 installment and Mr. Kirschmer testified by de- osition that he had no interest whatever in the $15,- 00.00 which was assigned to him and which was a part f the proceeds of the crop, and that he didn't want to

have anything to do with the litigation. Barr testified during the course of the trial that he had sold his lease on the Meiss ranch (R. 275) to the Farnam Bros. for the sum of $35,000.00 (R. 281).

On the 15th day of September, 1953, prior to the time this suit was instituted, but obvious to Barr that it would be, Barr told James C. Stevenson, Jr. that if he would stay out of the litigation which was about to occur, he would show Stevenson how to get his $15,000.00 (R. 347) from Kofues and Kirschmer. At this time no one had any knowledge that the ranch had been sold to the Farnam Bros., and by prior agreement Stevenson was to receive a percentage for the sale of the ranch as a commission. Barr admits that there was some talk about $15,000.00, but denies that he offered any bribe to Stevenson, Jr. (R. 355).

After hearing the witnesses and considering the exhibits and depositions, the trial court took the matter under advisement and subsequently handed down its memorandum decision (R. 37) which reads as follows:

> "Granting plaintiffs complete sincerity, I cannot accept their view of the controlling facts of the case. Landowner Kirschmer exonerates defendant and I do the same. One of plaintiffs' leading witnesses had an obvious interest in exculpating himself, another in paying off an old grudge.
>
> "The case has been hard fought, and the parties no doubt will desire to appeal. Will the attorneys please submit orders that will clean the record, so that all of the difficult questions that have been raised during the long drawn out proceedings may be properly presented to the Court of Appeals.
>
> "No personal judgment for costs."

The trial court failed to consider the fact that Kirschner, as shown by the records, was actually not qualified to speak as to the farming operations during the year 1953, because admittedly he was not present to determine whether the weed condition was such that they could and should have been erradicated, and also he was not present to determine the need for irrigation. Furthermore, defendant Barr was indebted to Kirschmer in the sum of $38,000.00. Also, the trial court failed to give due consideration to the overwhelming disinterested testimony which sustains plaintiff's position.

Even the honorable trial court recognized the case would be appealed and that it was for the Court of Appeals to pass final judgment (R. 37).

SPECIFICATIONS OF ERROR

I.

The trial court erred in Paragraph II of its Findings of Fact in finding that the management contract of J. C. Stevenson, Jr. remained in effect through the 1953 harvest season, and that it had any bearing whatsoever in the controversy between the plaintiff J. P. Tonkoff and the defendants Clay Barr and wife, because the evidence conclusively demonstrates that J. C. Stevenson, Jr. had no control over the defendant Barr in the manner of operating the ranch.

II.

The trial court erred in Paragraph X, sub-section a) of its Findings of Fact in finding as a fact that the

defendants Clay Barr and wife did not make any false or untrue warranties with respect to the acreage of growing crops on the Meiss Ranch because the evidence, without contradiction, demonstrates that the defendants Barr did not have 2800 acres planted in crops but had substantially less.

III.

The trial court erred in failing to find that the defendants Clay Barr and wife made false or untrue warranties with respect to the acreage of growing crops because the evidence clearly and convincingly shows that the defendants Barr did not have 2800 acres planted but that the amount was substantially less.

IV.

The trial court erred in Paragraph X, sub-section (b) of its Findings of Fact in finding as a fact that the defendants Clay Barr and wife did not fail, refuse or neglect to farm the Meiss Ranch in a good and farmerlike fashion, because the evidence overwhelmingly and convincingly demonstrates that the defendants Clay Barr and wife failed to properly erradicate weeds, irrigate and harvest the crops.

V.

The trial court erred in failing to find as a matter of fact that the defendants Barr failed and refused or neglected to farm the Meiss Ranch in a good and farmerlike fashion in that the evidence convincingly demonstrates that the defendants Barr failed to erradicate

veeds, failed to irrigate and failed to properly harvest he crops, all to the plaintiff's damage.

VI.

The trial court erred in Paragraph X, sub-section (c) of its Findings of Fact in finding as a fact that the defendants Clay Barr and wife did not breach or fail o perform any covenants, provisions or conditions of he assignment dated the 10th day of June, 1953, or ny subsequent promise or agreement, because the evidence convincingly demonstrates that the defendants Clay Barr and wife failed to have planted in crop the amount of acreage which they warranted, they failed to properly erradicate weeds which choked out the crop, hey failed to irrigate which resulted in a substantial portion of the crop burning up, and they failed to harvest properly in that excessive amounts of grain were eft lying on the field and in the road.

VII.

The trial court erred in failing to find as a fact that he defendants Clay Barr and wife breached and failed o perform their convenants, provisions and conditions of the assignment dated the 10th day of June, 1953 and subsequent promises and agreements because the evidence convincingly demonstrates that the defendants failed to have the amount of acreage planted in crops that they warranted, they failed to properly irrigate the premises, they failed to erradicate weeds, they failed to properly harvest with the result that a sub-

stantial amount of grain was left on the field and in the roadway.

VIII.

The trial court erred in Paragraph II of its Conclusions of Law in concluding that plaintiff is not entitled to judgment against defendants Clay Barr and wife for the amount prayed for in plaintiff's complaint, in that the facts upon which said conclusion is based are not sustained by the record.

IX.

The trial court erred in entering judgment for the defendants and appellees, Clay Barr and wife, and against the plaintiff.

X.

The trial court erred in failing to enter judgment in favor of plaintiff and against defendants Clay Barr and wife for the sum of $72,500.00 with interest thereon from the 15th day of November, 1953 until paid, at the rate of 6 per cent.

ARGUMENT

I.

THE TRIAL COURT ERRED IN PARAGRAPH II OF ITS FINDINGS OF FACT IN FINDING THAT THE MANAGEMENT CONTRACT BETWEEN KIRSCHMER AND KOFUES AND J. C. STEVENSON, JR. REMAINED IN EFFECT THROUGHOUT THE 1953 HARVEST SEASON.

The appellant by his first specification of error complains of the trial court's finding as a matter of fact that the management contract between Kirschmer and Kofues, owners of the property involved, and J. C. Stevenson, Jr., remained in effect throughout the 1953 harvest season. The reason for challenging this finding of fact is because of the implications or inferences that might be drawn therefrom. Any inference or implication that J. C. Stevenson, Jr. had any authority over the defendant Barr relative to the growing, caring for and harvesting of the crops involved is absolutely contrary to the evidence. Kirschmer, one of the owners of the property, when he leased the same to the defendant Barr, stated that J. C. Stevenson, Jr., commonly known as Bud, then became an employee of Clay Barr (R. 177). Even the defendant Clay Barr testified that Stevenson, Jr. felt that he had been knocked out of a good job (R. 190). The attempt on the part of the defendant Barr to make it appear by his testimony that J. C. Stevenson, Jr. was in control (R. 191) is absolutely contrary to all of the facts in this record. There

is absolutely no evidence in this record that J. C. Stevenson, Jr. at any time directed the defendant Barr as to what to do and how to do it. The defendant Barr can point to no document which put J. C. Stevenson, Jr. in charge of the defendant Barr (R. 266). J. C. Stevenson, Jr., himself, at no place in this record contended that he had any jurisdiction over Mr. Barr to the extent of telling Mr. Barr how to properly take care of or harvest the crop involved. As a matter of fact Barr admitted he had full control (R. 266, 267).

As a matter of fact the covenant and agreement between Kirschmer and Kofues (Dft. Ex. 14) shows upon its face that the defendant Barr agreed to farm the ranch in a farmerlike manner. This same language is used in the agreement and assignment (Pltf. Ex. 5) made between the defendant Barr and Tonkoff and Herman as trustees.

If the purpose of the finding of the trial court herein complained of is to exculpate the defendant Barr from farming the property in a farmerlike manner, then such a finding is not sustained by any evidence in this record and is clearly erroneous. Furthermore, such a finding would not relieve the defendant Barr from his obligation to perform the covenants of his agreement (Pltf. Ex. 5).

II.

THE TRIAL COURT ERRED IN PARAGRAPH X, SUBSECTION (a) OF ITS FINDINGS OF FACT IN FINDING THAT THE DEFENDANTS BARR DID NOT MAKE ANY FALSE OR UNTRUE WARRANTY WITH RESPECT TO THE ACREAGE OF GROWING CROPS ON THE MEISS RANCH.

Specifications of Error No. II and III are directed to this finding of the trial court, which finding is clearly erroneous.

Plaintiff's Exhibit 5 provides as follows:

> "* * *, Clay Barr and Betty Barr, * * *; and warrant that there is planted to crop on the above-described farm property approximately 2800 acres;"

This warranty is signed by Clay Barr and Betty Barr and directed to the plaintiff in this action. The defendant Barr admitted that he made representations as to the amount of acreage (R. 253, 254). The defendant Barr testified that he was only making a guess or estimation as to how much grain was planted (R. 244) and admitted further that he did not know in fact how many acres of grain there were in the various crops (R. 245). Certainly the defendant Barr, of all people, was in a better position to know how much acreage had been planted than anyone else and particularly the plaintiff in this case and his beneficiaries. There is absolutely no evidence in this record by the defendant Barr as to the exact amount of acreage that he planted in each of the named grains. Contrasted with the de-

fendant Barr's failure to specify the amount of acreage he had planted in each of the named grains, we have the testimony of Mr. J. C. Stevenson, Sr., that there were 2500 acres planted in oats, wheat, barley and rye (R. 96). We also have the testimony of Mr. E. J. Welch that there were between 2500 and 2600 acres that were actually planted in grain (R. 156). We also have the testimony of Mr. Frank Kofues, sometimes called Hofues, one of the owners and signatories to the lease agreements (Dft. Ex. 14) that there were 2500 acres planted (R. 442). In addition, we also have the testimony of J. C. Stevenson, Jr. that there were 250 acres of rye, 1200 acres of barley, 132 acres of wheat, and 1086 acres of oats, or a total of 2668 acres actually planted (R. 106).

Thus, the appellant in the trial court introduced evidence that the defendant Barr was short at least 132 acres, contrary to his warranty, and at the most 300 acres from his warranty. This, we submit, shows that the representations made by the defendant Barr were materially false. The materiality of these representations becomes apparent when it is considered that this land was capable of producing and had in the past produced approximately 50 bushels per acre of various grains, which on the open market would be equivalent to $100.00 or more. A shortage of 132 acres would amount to $13,200.00, while a shortage of 300 acres would amount to $30,000.00.

We submit that the trial court's finding is not sus-

ained by the evidence, but is actually contrary to the vidence, and the trial court erred in not finding as a act that the defendant Barr had made a false and un- rue warranty with respect to the amount of acreage f growing crops on the Meiss Ranch.

III.

HE TRIAL COURT ERRED IN FINDING AS A FACT THAT THE DEFENDANTS DID NOT BREACH OR FAIL TO PERFORM ANY COVENANT, PROVISION OR CONDITION OF THE ASSIGNMENT OF JUNE 10, 1953 (Ex. 5).

Under this heading will be covered Specifications of Error Nos. IV through IX because all of these specifications of error from an evidential standpoint are so closely interwoven.

In order to assist the Appellate Court, an Appendix has been prepared and attached to this brief in the form of a chart covering what appellants believe to be the salient testimony of each witness concerning the primary issues involved relative to the actual farming operation.

THE LAW:

The issues presented by this appeal are factual. The only two points of law in which the court may be interested are:

(1) What is meant by the words, "the assignors herein agree to farm said lands in a good and farmer-like fashion and in accordance with the terms of the aforementioned lease * * *," which are contained in

Ex. 5 and which the defendant Barr was bound to perform.

The words, "farmerlike fashion," are defined in Vol. 25, C. J., pg. 674, as follows:

> "A workmanlike manner; as good farmers usually do."

We believe that they would also mean the same as "husbandlike and proper manner" which are defined as follows:

> "A term meaning according to the course of farm cultivation and management in that part of the country where the premises are situate." See 42, C. J. S., pg. 364.

(2) What showing must be made upon appeal to reverse the Findings of Fact of the trial court? This court is undoubtedly familiar with the case of *United States v. Oregon State Medical Society*, 343 U. S. 326, 96 Law Ed. 978 where the Supreme Court of the United States, in referring to Rule 52 of the Federal Rules of Civil Procedure, said:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made."

BACKGROUND:

The case at bar stems out of a fraud action against the defendant Barr (R. 251) which, at his insistence, (R. 251) he settled for the sum of $72,500.00 by executing Ex. 5. At the time of this settlement, according to the witness Welch, who is a beneficiary under Ex. 5, the defendant represented the potential value of the

crops to be $250,000.00 to $300,000.00 (R. 143). Barr denied this (R. 255) and claimed he only represented as to the amount of acreage (R. 253) which we have heretofore demonstrated was wrong and false. Barr's denial is incredible, especially when he was the one who had just returned to Spokane from the ranch (R. 251) and, of all people, was the only one who at least in the negotiations knew or should have known how many acres of grain had been planted and what the potential prospects of the crop for the 1953 season would be. It should appear obvious to this court that no one in his right mind would settle a lawsuit for the sum of $72,500.00 as a party plaintiff upon the wild speculation of what an alleged (but proven false) 2800 acre grain ranch would potentially produce. This court knows from experience that the productivity of grain land varies considerably and unless it has substantial productivity the crop might not even make expenses. Furthermore, defendant Barr was only entitled to one-half of the crop in accordance with defendants' Ex. 14. In addition to this, in accordance with Ex. 5, the defendant Barr was entitled to $15,000.00 off the top for harvesting expenses. It thus becomes quite apparent that in order to pay the sum of $72,500.00 in accordance with Ex. 5 and also the sum of $15,000.00 for harvesting expenses, that the minimum crop to be produced would have to be at least $175,000.00. Again, it should be pointed out that if the defendant Barr had no hopes, expectations or possibilities of producing a crop that

would bring $175,000.00, why was the provision put in Ex. 5, Paragraph 1, sub-section (b), whereby Barr was to receive the warehouse receipts for any crops not sold.

The testimony of Welch relative to the representations as to the amount in dollars and cents that the land would produce is corroborated by the testimony of Kirschmer, one of the owners of the ranch, who testified that the crops should have brought $250,000.00 (R. 402) or $300,000.00 (R. 410), but instead something went wrong.

The defendant Barr had gone into the Meiss Ranch under the lease agreement, Ex. 14, about the 7th of May, 1953. Undoubtedly Mr. Barr worked hard and diligently up to about the 7th of June, 1953 when he went to Spokane as a party to the fraud suit. At that time Mr. Barr had the acreage planted although it was not the 2800 acres that he represented. We also believe that a reasonable person would have the right to rely upon Mr. Barr's representations contained in Ex. 5 that the acreage was "planted to crops" meant just what it said and that if the crop, or any part thereof, had been improperly planted he should have so stated at that time.

FARMING OPERATIONS AFTER EXECUTION OF EXHIBIT 5:

The defendant Barr returned, according to his testimony, to the Meiss Ranch immediately after June 10, 1953 when Ex. 5 was executed. We believe that this is an instance where a person's intentions, if they can be

ascertained, paint the true and correct picture of what he did or failed to do in its proper light. In this case, Mr. Barr not only once but twice, definitely stated, "I had no intention, I say, of paying that $72,500.00 equity which you were claiming in that crop," (R. 261). Certainly the time should come when Mr. Barr should be required to obey the principles of fair and honest dealing. However, insofar as the record in this case is concerned, we shall endeavor to convince this court that Mr. Barr carried out his intention of not paying the $72,500.00.

CONDITION OF CROP JUNE 10, 1953:

The overwhelming evidence in this case shows that the condition of the crops on the 10th of June to the middle of June, 1953 was very good (R. 65, 105, 129, 527). Even Barr admitted that the crops looked pretty fair around the 10th to the 15th of June, 1953 (R. 212) with the exception of those on the adobe ground (R. 212). As for general growing conditions for the year 1953 and in the area of the Meiss Ranch, as compared with prior years they were very good (R. 64, 136, 442, 491, 503, 510). As a matter of fact the growing year of 1953 was comparable with the year 1947 (R. 64) when this land produced almost an $800,000.00 crop (R. 352).

WEEDS AND THE NECESSITY OF SPRAYING:

Weeds, which can ruin a grain crop, began showing their unsightly heads in the month of May, 1953 (R. 318). As a matter of fact, Mr. Liston, an aerial crop

duster called as a witness by the defendant, testified that there were quite a number of weeds there on May 15, 1953 (R. 177). Mr. Liston was out soliciting business, but did not get any. Furthermore, the weeds on May 15, 1953 were from 1 to 1½ inches tall, according to Mr. Liston (R. 177). As a matter of fact, Mr. Kofues testified that at the start of the season a large part of the land was grown up in weeds (R. 432).

In the area of the Meiss Ranch it is customary to spray for weeds (R. 110, 151, 494, 512, 514, 517, 531).

We are not talking about a small weed patch, but to the contrary an extensive amount of weeds and weed patches. They were awfully thick (R. 67). One witness estimated from 150 to 200 acres in weeds (R. 519). Another witness estimated 200 acres (R. 513) while another said a couple hundred acres (R. 493). Several witnesses estimated between 300 and 400 acres in weeds (R. 531) and another witness estimated 300 acres in weeds (R. 109). These weeds simply took over (R. 530, 268, 379, 385, 438, 503).

Mr. Stevenson, Sr. advised Mr. Barr to spray (R. 67) but Barr did not follow his advice (R. 73) and Mr. Barr admitted that Mr. Stevenson, Sr. recommended spraying (R. 201). Mr. Barr's own witness, Mr. Liston the aerial crop duster, when called by Mr. Barr on about July 2nd or 3rd, 1953 to look the field over with regard to spraying, said that he did and at that time the weeds were too big to spray (R. 171) and he so advised Mr. Barr (R. 172). Mr. Liston further stated

hat most of the spraying done in that area is done be-
ween June 10th and up to the middle of July. The only
eason he did not spray was that he was not asked to do
o prior to July 2nd (R. 176) and then it was too late
nd as a result, no spraying was done (R. 402, 541, 530,
7, 148). As a matter of fact, it was admitted in open
ourt by the defendants' counsel that there never was
ny effort at weed control (R. 320).

Mr. Kirschmer, one of the owners of the ranch, stat-
d that a good farmerlike manner would mean spray-
ng for grass when you found the weeds coming up
hrough the grain (R. 402). This defendant Barr ut-
erly failed to do, notwithstanding advice from Mr.
tevenson, Sr. What excuse does he have to offer?
'rankly, we can find no legitimate excuse except Mr.
Barr's complete indifference to the operation of the
anch. Of course, he had no intention of paying this
72,500.00 obligation. Mr. Barr's own expert, namely
Ir. Liston the crop duster, did not testify that the
veeds could not have been effectively sprayed between
he period that he visited the ranch on May 15th and
is subsequent visit on July 2, 1953, because obviously
here was a period of time when the weeds could have
een sprayed effectively. Instead, several hundreds of
cres of crops were lost and this is a substantial loss
vhen it is considered from a dollars and cents produc-
ion standpoint that this land is capable of producing,
nd would have produced, at least $100.00 per acre.

Moving pictures were introduced in evidence (Pltf.

Ex. 11), showing the vast extensiveness of the weeds that took over and choked out a considerable portion of the crop. These pictures bear mute but very descriptive evidence of the defendant Barr's indifference and failure to farm this grain crop in a farmerlike manner in accordance with the customs and the practices of that area, as well as the necessities which common sense would have dictated.

EXPERIENCE AND COMPETENCY OF HELP:

According to Mr. Barr, when he left Spokane on or about the 10th day of June, 1953 he returned to the ranch and stayed there until June 20, 1953 (R. 209). He then returned to his own 2300 acre ranch approximately 500 miles to the north in the State of Oregon where he remained until he received a call about July 1st complaining not only of the failure to spray, but of the failure to irrigate (R. 213, 259). He was then brought down to the ranch and shown the conditions that existed there with regard to the crop drying up. He then left the ranch and returned to his ranch in the northern part of Oregon (R. 263). He then again returned to the Meiss Ranch around the 12th to the 15th of July, 1953. He remained a day or two and then returned to his ranch in the northern part of Oregon and stayed there until about the 7th or 8th of August (R. 210, 272) at which time he returned to the Meiss Ranch. The amount of time that Mr. Barr spent at the Meiss Ranch is disputed by a number of witnesses who were on the ranch practically every day throughout the

ason (R. 106, 131, 508, 533). In any event, it appears om this record that Mr. Barr left no one at the ranch his behalf between the 20th of June, 1953 and the th or 15th of July, 1953 (R. 310) at which time he ought his young cousin, Perry Morter, down to the nch. Perry Morter, at that time, was 19 years of age R. 308). He had worked for the Barrs (R. 308) but he d never had any experience handling irrigation be- re (R. 315, 316). Yet this is the young man that the fendant Barr brought back to the ranch on either the th or 15th of July, 1953 and left in charge of the irri- tion of these crops (R. 218, 219). Any one who has er had any farming experience, particularly with rigation, knows that irrigation type farming is a spe- alty and you do not become an irrigator over night. ou must learn how to handle water and the multitude things that go with irrigation farming. Yet, here we nd the defendant Barr leaving a young man com- etely inexperienced, in charge of irrigating this large rming operation. To us this is like a surgeon leaving e patient on the operating table and calling in a first- ear medical student to take over and do an appendec- my while the surgeon leaves for another job. It dem- nstrates utter and total indifference and not the andards of an ordinary reasonable and prudent per- n or farmer who is attempting to do his work in a od and farmerlike manner. This indifference possibly explained by the defendant Barr's attitude, because s we have heretofore pointed out, he had no intention paying the $72,500.00.

IRRIGATION WAS NECESSARY:

In the area of the Meiss Ranch and on the Meiss Ranch, irrigation is necessary (R. 512, 517). You simply do not grow crops in that area without irrigation (R. 512). If you do not irrigate, the crops will dry out (R. 65). Now Mr. Barr testified that he left the ranch on June 20, 1953 (R. 209). Whether he left sooner we cannot positively say, but in any event, the condition of the crops from the lack of moisture was so bad by July 1st that Mr. Barr was contacted and advised to come to the ranch at once (R. 213). He flew to the ranch with Mr. Tonkoff and others (R. 259). He admitted that he received this call about July 1st regarding the property needing irrigation (R. 213) and the complaint was made at the ranch about the irrigation (R. 262), and Mr. Barr knew that you couldn't grow crops without irrigation (R. 269). The new ground was dry and cracked (R. 215) and the crop was small and stunted (R. 262). He further admitted that in the area where the grain was planted and the ground was cracked that the grain did not get enough moisture (R. 277). The condition on July 1st was so bad that Mr. Stevenson called Mr. Kirschmer about the crops not being properly irrigated (R. 439). Mr. Kirschmer admitted this (R. 404) and Mr. Kirschmer thereupon called Barr concerning the matter of irrigation (R. 404). On the other hand, Mr. Barr claims that he called Mr. Kirschmer relative to irrigation (R. 283). In any event, the land was drying up and cracking and the

rop was burning up. One witness said there were racks from ½ to 1½ inches wide and from 1 to 10 eet long (R. 528, 529). Another witness said that here were cracks 3 inches wide (R. 490). Another witness said the cracks averaged from 1 inch to 3 or 4 inchs wide and in some places were 20 to 30 feet long (R. 26). As far as the crop was concerned, some of it was nly 4 inches to 1 foot high (R. 71). The evidence is ust simply overwhelming that the crop was burning p from the lack of moisture and the defendant Barr owhere has denied this. Mr. Stevenson, Sr. advised Ir. Barr on how to irrigate (R. 86) and that the crops ould have been irrigated (R. 88). Did Mr. Barr take ny immediate steps to prevent this crop from burning p from the lack of moisture? The answer is a definite no." On July 1st when Mr. Barr was brought to the anch by Mr. Tonkoff, Mr. Barr promised Mr. Stevenon, Jr. (R. 107) and also Mr. Welch (R. 144) that he Barr) would be down with a crew the following Monay to begin irrigating. Barr never showed up for bout three weeks (R. 107). When Mr. Barr did finally how up, he brought with him his young cousin, who as entirely and utterly inexperienced in irrigation arming. There never was any irrigation done except or one or two days' experimental work and then Barr rdered the water to be turned off (R. 269, 311). There s absolutely no reason why crops should have been alowed to burn up. It was simply a matter of Barr's indifference to the whole operation. The overwhelming

weight of the evidence, without controversy, is that there was an abundance of water available not only from the lake, but also from wells upon the property (R. 65, 93, 103, 108, 211, 375, 495, 512, 518, 529, 536) and for those places where the land was not exactly level there was available a portable sprinkling irrigation system which was ½ mile long (R. 347, 382, 529) and there were ditches for irrigation purposes (R. 500).

When crops are burning up from the lack of moisture and where irrigation facilities are available such as they were on the Meiss Ranch, it is the duty and obligation of any farmer who is farming in a good and farmerlike manner to immediately take steps to get water on the crop. Conditions such as are disclosed in this record that existed on the 1st day of July, 1953 relative to the lack of moisture to the crops, required immediate attention. The defendant Barr by his own evidence has clearly demonstrated that he did not give these crops his immediate attention and as a result, a substantial portion of the crops that otherwise would have been harvested was lost because of his inaction and neglect.

The moving pictures (Pltf. Ex. 11), will vividly portray the cracks in the earth and the dryness of the ground, as well as the stunted crops from the lack of moisture. These pictures tell a story more vivid than the printed page.

THE ACRES OF LAND THAT DEFENDANT BARR PLOWED UP THAT WERE IN CROPS:

The defendant Barr admits that he plowed up crops without anybody's consent or authority. He did this, as he says, to prevent wild oats and things from growing (R. 202) and he plowed the oats under because they were so thin and the weeds were so bad (R. 243) and that was the proper thing to do.

It undoubtedly would be good farming practice to plow up a patch of weeds and also to plow to prevent wild oats from growing. However, as it has heretofore been demonstrated, the only reason weeds were growing was because the defendant Barr failed to spray. And the only reason the oats were thin was because the defendant Barr failed to irrigate. The defendant Barr says that he only plowed up about 100 acres (R. 220). Mr. Stevenson, Sr. says 200 acres (R. 63). Mr. Welch said 200 acres (R. 143). On the other hand Mr. Stevenson, Jr. said he plowed up 100 acres and then some other parts of the field (R. 109). In any event, at the rate of $100.00 per acre, no less than $10,000.00 was lost by reason of this plowing under. This acreage that was plowed under is far short of all the damage caused by weeds, as well as the damage caused by the failure to irrigate. The moving picture films will demonstrate this.

BARR DID NOT FARM THE LANDS AND CROPS IN A GOOD AND FARMERLIKE FASHION:

We believe that what we have heretofore shown in

this brief and by our reference to the actual testimony adduced at the trial, that the question of whether Mr. Barr farmed the crops and lands in controversy in a good and farmerlike manner has already been answered in the negative. However, Mr. J. C. Stevenson, Sr. said that Mr. Barr did not farm in a good and farmerlike manner but he did so in a very slipshod manner (R. 72). Mr. J. C. Stevenson, Jr. said the same thing (R. 118). Mr. Barr admitted that it wasn't his original intention when he took the lease to be operating two ranches so far apart, but that is what happened and he couldn't get down to the Meiss Ranch all of the time (R. 265). This, of course, is no excuse for his breach of agreement. Mr. Kirschmer, upon whom the trial court seems to have placed much weight, said that he didn't criticize the way Barr operated the ranch (R. 385) but he was not entirely satisfied with Barr's operation (R. 385) because he stated that some improvements might have been made. Further he stated that "it wasn't farmed right good" (R. 402). But the weight to be attached to Mr. Kirschmer's testimony must be determined by his ability to pass judgment from his actual knowledge of what took place during the 1953 season. Mr. Kirschmer himself admitted that he visited the ranch on May 1, 1953 (R. 370) and returned to the ranch early in September, 1953 (R. 377) and that he was not familiar with the country around the Meiss Ranch and had no farming experience in that area (R. 399) and he was not familiar with the different fields.

When we consider these factors, and in all fairness to Mr. Kirschmer as well as the trial court, how can much weight be placed upon Mr. Kirschmer's testimony when all of the things of which we are complaining took place during a period of time when Mr. Kirschmer was not present on the ranch and knew nothing of what was going on. Too, it must be remembered that Mr. Barr, the defendant, owes Mr. Kirschmer $38,000.00 and Mr. Kirschmer undoubtedly hopes to get paid, but irrespective of this, how can Mr. Kirschmer's opinion or judgment outweigh the opinion and judgment of people who were actually present throughout the season and know thereof they speak?

Mr. John Ratliff, Jr., a disinterested witness who was on the ranch practically all of the time from April to November 1, 1953 (R. 527) and who was farming property on the Meiss Ranch and is thoroughly familiar with it, and basing his opinion on what he observed during that period of time, stated that the wheat crop was practically a total loss and that lack of water was the main cause (R. 532). He further stated that proper farming standards were not applied to the ranch, nor to the growing and cultivation of the crops (R. 534, 535) and that Barr neglected the crops (R. 535) and he told the same thing to Barr (R. 535).

Again, Mr. Clarence Enloe, another disinterested witness who is familiar with the Meiss Ranch (R. 489) and who was there during the year 1953, stated that the crops were not cultivated in a good and farmerlike

manner consistent with the standards of the vicinity (R. 494).

Mr. Kofues, one of the owners of the property, corroborated Stevenson when he testified that Stevenson called and complained about the property not being properly farmed in July or August (R. 438).

When one considers the evidence in this record dispassionately one cannot help but be convinced that defendant Barr did not perform his obligation to farm the Meiss Ranch and the growing crops thereon in a good and farmerlike manner.

CARELESSNESS IN HARVESTING CROPS:

We have pointed out the indifference of defendant Barr with regard to erradication of weeds and the utter lack of irrigation. This same indifference, we believe, is characteristic of the harvesting of the crops, with the additional factor that when harvesting began the defendant Barr had an additional reason for being indifferent—he had sold out his lessee's interest to the Farnam boys (R. 225) for $35,000.00 (R. 281). This sale took place prior to the harvest and the only obligation that Barr had was to get the crop off. This unquestionably has a bearing upon the speed with which the crop was taken off the premises, speed that had the ultimate effect of a substantial loss in crop.

Mr. Stevenson, Sr., an extremely well qualified man and entirely disinterested, said that it was a sloppy job of harvesting (R. 69). He explained that the combines were operating at too fast a speed (R. 69) and that the

ffect of such speed resulted in the kicking over of a lot f grain and also knocking a lot of small grain down so hat it could not be cut (R. 69). He estimated that there ere from 400 to 500 pounds of grain per acre left in he fields and windrows (R. 70); that as a matter of act there was so much grain left that two of his cattle ied because of bloat (R. 69). This had never occurred efore (R. 69). In this Mr. Stevenson, Sr. was corro- orated by Mr. Stevenson, Jr. (R. 113, 149) except hat Mr. Stevenson, Jr. estimated there were between 00 and 600 pounds per acre left on the ground (R. 14).

Mr. Welch, another witness, estimated there were etween 500 and 600 pounds per acre left on the ground R. 149).

Mr. Barr himself said that he observed the opera- ions and saw grain coming out onto the ground (R. 30).

Defendant Barr said there was not an excessive mount of waste (R. 229) and he is corroborated only y witnesses who are relatives of his and certainly not isinterested (R. 302, 313, 326).

The evidence further shows there was a considerable mount of grain on the highway between the ranch and varehouse (R. 115, 149, 313, 521). This was caused by riving the motor vehicles or trucks at too fast a rate of peed without any protection over the top of the grain nd as a result of the wind or air pressure created by he speed of the vehicles without any protective cover-

ing, the grain blew off (R. 533). All of the witnesses agree that a tailgate had come off one dump truck and that a considerable amount of grain had been spilled on the highway (R. 115, 149, 236, 294, 313, 384). However, this did not explain all of the grain on the highway.

We believe the record shows that there was a very substantial loss of grain in the harvesting caused by defendant Barr's failure to harvest the crops in a farmerlike manner.

IV.

THE TRIAL COURT ERRED IN FAILING TO ENTER JUDGMENT IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANTS.

We sincerely believe we have demonstrated that the trial court erred when it entered judgment in favor of defendants and appellees. We further submit that in view of the record in this case the plaintiff was entitled to judgment against defendants Clay Barr and wife for the sum of $72,500.00 with interest thereon at the rate of 6 per cent per annum from the 15th day of November, 1953 until paid.

We do not believe that the defendants and appellees can point to any evidence in this record that would show that the crop involved could not have produced in excess of $200,000.00 for the crop year 1953 in view of the prevailing market prices, and this is especially true when, as we have heretofore pointed out, it was estimated that the potential crop and productivity for the

ear 1953 would be from $250,000.00 to $300,000.00. his estimate is entirely reasonable and not mere speculation when it is considered that the 1953 crop growg year was very good and comparable to the year 947 when this same land produced $800,000.00 in ops.

When consideration is given the very large amount acreage taken by weeds with the resultant total loss crop from that acreage, the amount of ground lowed under by defendant, the stunted growth of uch of the grain caused by the lack of water and that ck of water and moisture has the effect of cutting wn the weight of the grain, and the amount of grain ft on the ground because of the slipshod manner of arvesting, it becomes quite obvious that because of the efendants' failure to farm this property in a farmerke manner the plaintiff has suffered a very substantial ss and, as a matter of fact, has been damaged in the m of the full $72,500.00 which he was entitled to reive and which he had every right to expect to receive.

The total amount of the crop produced in dollars and nts was the sum of $88,746.53 (R. 24) and of this m the defendant Barr was entitled to receive one-half ursuant to his lease agreement with Kirschmer and ofues (Ex. 14), namely the sum of $44,373.28, which as deposited into the registry of the court (R. 26). rom this sum was deducted the sum of $15,000.00 for arr's cost of harvesting pursuant to Ex. 5. This leaves balance in the sum of $29,373.28 less $500.00 (R. 38,

45) which the plaintiff ultimately received in December, 1955. Thus, the plaintiff should now have judgment against the defendants and appellees for the difference between $72,500.00 and $29,373.28, or the sum of $43,126.72.

In addition to this amount the plaintiff should have interest at the rate of 6 per cent per annum on the entire amount of $72,500.00 from the 15th day of November, 1953, when according to the terms of Ex. 5 the sum was payable, to the 8th day of December, 1955, and should have interest at the rate of 6 per cent per annum on $43,126.72 from the 8th day of December, 1955 until judgment is rendered by this honorable court.

We believe the plaintiff and appellant is entitled to interest because the amount to which plaintiff is entitled is a liquidated sum and payable on a day certain. It was not so paid.

CONCLUSION

It is respectfully submitted that the judgment of the trial court should be set aside and reversed and that judgment be entered for appellant in accordance with the amounts set forth in Paragraph IV of this brief, after giving the defendant Barr credit for $29,373.28.

Respectfully submitted,

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FERTIG & COLOMBO,
Attorneys for Appellant